Construction Defects Coverage and the CGL Policy: Coverage for Defective Work May Exist

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OVERVIEW

Obtaining insurance coverage for defective work became more important as the general contractor business model evolved. Many decades ago, most general contractors self-performed their work, but beginning in the 1970's, more and more of that work was subcontracted out to independent contractors, to where in today’s world, general contractors self-perform an increasingly small amount of the work they bid.

From a business risk perspective, this evolution meant that the general contractor had less ability to directly control the quality of the work since most of the work was being performed by those over which the general contractor could not exercise direct control of the details of that work.

The insurance industry took notice and began to evolve its own products to provide some measure of protection for this added risk to the general contractor, and the Commercial General Liability (CGL) Policy began to provide limited coverage to protect the general contractor from the subcontractor’s defective work.

Prior to the 1986 revision of the CGL Policy Form, the business risk exclusions included in the prior form precluded any coverage for subcontractor defective work. In order to begin offering coverage, the insurance industry created a new endorsement called “Broad Form Property Damage Endorsement” (BFPD). Introduced in 1976, it deleted several parts of the business risk exclusions and substituted more restrictive ones. The net effect of the new limiting language was to extend coverage on a limited basis for defective work. The result became so popular that it was eventually incorporated into the CGL policy form itself in 1986. The change
was commonly referred to as the “Subcontractor Exception to the Your Work Exclusion.”\(^1\) But this subcontractor exception only applies if “products-completed operations” (PCOH) coverage is included in the policy, as it is in the standard form 1986 policy. More important, the policy exclusions and exceptions are irrelevant unless the initial insuring agreement grants coverage. The policy covers claims for “property damage” that are caused by an “occurrence” as those terms are defined in the policy.

Courts across the United States are divided on the issue of whether a contractor’s faulty workmanship fits in the policy definition of “occurrence”. Some states have held that faulty workmanship or improper construction is not an “occurrence” because it can never be an “accident”. Other states have held that faulty workmanship or improper construction can be an “accident” if the resulting damage occurs without the insured’s expectation or foresight.

In this paper, we will present the best arguments for coverage and a survey to determine which states have or might find CGL coverage for faulty workmanship and which states have held or might hold to the contrary. To start, we identify eight states whose highest courts in the past six years have concluded in well-reasoned decisions that faulty workmanship that was neither intended nor expected from the contractor’s standpoint can constitute an “accident” and thus an “occurrence” under a post-1986 standard form CGL policy. These decisions, in the order they were decided include:


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7. *Architex Association, Inc. v. Scottsdale Insurance Company* (Miss. 2010) 27 So.3d 1148 (“*Architex*”); and


But there are five state Supreme Courts (Nebraska, North Dakota, Pennsylvania, Arkansas and Kentucky) which have held during that same six-year period that there is no CGL coverage for faulty workmanship unless it causes personal injury or property damage to something other than the insured’s work product. See pages 10-12.

Twelve other state Supreme Courts have addressed the issue, eight of them finding coverage and four finding no coverage. See footnotes 2 and 3. Some states have not yet addressed the issue and the lower court and federal court decisions in the states that have addressed the issue are divided. See Exhibit A.

**THE RELEVANT CGL POLICY PROVISIONS**

The proper analysis of the issue must begin with an examination of the relevant provisions in the post-1986 CGL policies:

**SECTION I – COVERAGES**

**COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

1. Insuring Agreement

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to
which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply . . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

2. [Business Risk] Exclusions

This insurance does not apply to . . .

j. Damage to Property

“Property damage” to:

(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

1. Damage to Your Work

"Property damage" to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

SECTION V - DEFINITIONS

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
16. “Products-completed operations hazard”:

   a. Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:

(2) Work that has not yet been completed or abandoned. However, “your work” will be deemed completed at the earliest of the following times:

   (a) When all the work called for in your contract has been completed.
   (b) When all the work to be done at the job site has been completed if your work calls for work at more than one job site.
   (c) When that part of the work done at the job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

17. “Property damage” means:

   a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

   b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

21. “Your product” means “any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of …” (emphasis added)

22. “Your work” means “work or operations performed by you or on your behalf … and includes “warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work’ …”

THE TREND IN THE LAW: STATE SUPREME COURT DECISIONS 2004-2010

Supreme Court decisions from eight states in the past six years have advanced the argument that unintended construction defects can constitute an “accident” or “occurrence” under a CGL policy and that damage to the completed work of the general contractor can
constitute “property damage” if the work was performed by a subcontractor. Those cases are listed in the Overview of this brief in the order they were decided. The following summarizes the key general concepts from those eight cases that are useful in arguing for CGL coverage for construction defects:

1. The policy should be evaluated as a whole. In determining coverage under a CGL policy, look first at the initial grant of coverage, then at any “exclusions” to coverage, and then at any “exceptions” to the exclusions.

2. The threshold question in determining coverage under a CGL policy is whether the claim at issue is for “property damage” caused by an “occurrence” within the general grant of coverage in the insuring agreement.

3. Because the definition of “occurrence” is an “accident,” which is not defined by the policy, determination of whether there has been an “occurrence” depends on how the state law has defined “accident.”

4. Examples of definitions of “accidents” deemed to be “occurrences” by the cases recognizing the emerging law include:

   a. An “accident” is “an event not reasonably to be foreseen, expected and fortuitous” and includes “negligent acts of the insured causing damage which is un-designed and unexpected.” Travelers Indemnity Company of America v. Moore & Associates (Tenn. 2007) 216 S.W.3d 302, 308

   b. An “accident” is generally understood to be a fortuitous, unexpected, and unintended event, “something unforeseen, unexpected, and unpremeditated”. Lamar Homes, Inc. v. Mid-Continent Casualty Company (Tex. 2007) 242 S.W.3d 1, 8

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c. “[I]f the act is deliberately taken, performed negligently, and the effect is not the intended or expected result had the deliberate act been performed non-negligently, there is an accident.” *Id.* at 9

d. The terms “accident” and “occurrence” include damage that is the unexpected, unforeseen, or un-designed happening or consequence” of an insured’s negligent behavior, including “claims for damages caused by an insured’s defective performance or faulty workmanship.” *Id.*

e. Faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an “accident” and thus an “occurrence” under a post-1986 CGL policy. *United States Fire Insurance Company v. J.S.U.B., Inc.* (Fla. 2007) 979 So.2d 871, 888.

f. In the absence of a prescribed definition in the policy, the definition of “accident” is “an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt.” *Auto Owners Insurance Company v. Newman* (2009) 385 S.C. 187, 192.


5. Whether an insured’s faulty workmanship was intended or accidental is dependent on the facts and circumstances of a particular case.

6. It is the initial broad grant of coverage, not the exclusions and exceptions to exclusions, that ultimately creates (or does not create) the coverage sought.

7. Inclusion of the “business risk exclusions” in the policy would be meaningless if no construction defects, whether negligently or intentionally caused, were included in the initial grant of coverage.

8. The “business risk exclusions” would be unnecessary if no losses actionable in contract could ever be “occurrences.”

9. The business risk rule does not serve as an initial bar to coverage, but rather as a potential exclusion under the “your work” exclusion if an initial grant of coverage is found.

10. Exclusion (l), which applies to “products-completed operations,” generally excludes coverage for property damage to the insured’s completed work, with one notable exception for work performed by a subcontractor.
INSURER ARGUMENTS ADDRESSED BY STATE SUPREME COURT DECISIONS
2004-2010

All of the eight Supreme Court cases addressed and effectively disposed of popular insurer arguments that a CGL policy does not cover defective construction that injures only the completed work of the general contractor; however, the Texas Supreme Court in *Lamar Homes v. Mid-Continent Casualty*, supra, 242 S.W.3d 1, 7 articulated those insurer arguments the best:

1. The CGL policy’s purpose is to protect the insured from tort liability, not claims of defective performance under a contract.

2. The economic loss rule dictates that all damages arising from defective work constitute economic losses for breach of contract rather than property damage.

3. Defective work cannot be an “occurrence” because it is not accidental; a general contractor should expect that faulty workmanship will result in damage to the project itself, and if an injury is expected, it is not accidental.

4. Extending CGL coverage under these circumstances transforms liability insurance into a performance bond.

While many of the courts gave expansive discussions to refute these arguments, they are most simply stated this way:

1. The “business risk exclusions” would be unnecessary if no losses actionable in contract could ever be “occurrences” under a CGL policy: the plain language of the “occurrence” definition does not distinguish between “tort” and “contract” claims but is instead broad in scope. Additionally, ISO issues a “breach of contract” endorsement, not present in the post-1986 standard form CGL policy.

2. The economic loss rule is not a useful tool for determining insurance coverage; it is a liability defense or remedies doctrine, not a test for coverage. The insuring agreement does not mention torts, contracts, or economic losses, nor do the terms appear in the definitions of “property damage” or “occurrence.”

3. The third argument is based on a false assumption—that the failure to perform under a contract is always intentional. The CGL policies are designed to provide liability protection for the general contractor and their subcontractors for accidental, inadvertent acts which breach accepted duties and proximately cause damage to a person or property.
4. Any similarities between the protections provided by CGL insurance and the protections provided by a performance bond are irrelevant. The CGL policy covers what it covers and no rule of construction operates to eliminate coverage simply because similar protection may be available through another product.

SEVEN STATE SUPREME COURTS RESIST THE TREND

The Supreme Courts in the states of Nebraska, North Carolina, Pennsylvania, Arkansas and Kentucky during the period 2004-2010 held that a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, but that it may provide coverage where the faulty workmanship causes bodily injury or damage to another property.3

Asked to determine whether the subcontractor exception to the “your work” exclusion in the policy allowed coverage, the Nebraska Supreme Court in Auto-Owners Insurance Company v. Home Pride Companies, Inc. (2004) 268 Neb. 528, 532 pointed out that the exclusion is irrelevant unless the insured can show “property damage” caused by an “occurrence.” In what appears to be somewhat circular reasoning, the Court stated that “a majority of courts” have determined that faulty workmanship is not an accident and therefore not an occurrence, but then held that although faulty workmanship, standing alone, is not an occurrence under a CGL policy, an “accident” caused by faulty workmanship is a covered occurrence. Id. at 533, 535. “Stated otherwise, although a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or

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3 A sixth Supreme Court, in Iowa, has also held that defective workmanship that results in damages only to the work product itself is not an “occurrence” under a CGL policy. Pursell Constr. Inc. v. Hawkeye-Security Ins. Co. (1999) 596 N.W.2d 67. More extreme, the Oregon Supreme Court has held that there can be not “accident” within the meaning of a CGL policy when the resulting damage is merely a breach of contract. Oak Crest Constr. Co. v. Austin Mut. Ins. Co. (2000) 998 P.2d 1254, 1257. Iowa and Oregon were four to five years ahead of the flurry of cases in state Supreme Courts between 2004 and 2010. And 20 years ago, two other Supreme Courts held that a CGL policy does not cover a contractor’s faulty workmanship. See Dodson Construction Co. v. St. Paul Ins. Co. (1991) 1991 OK 24 and Peerless Ins. Co. v. Brennon (Maine 1989) 564 A.2d 383.
property damage to something other than the insured’s work product, an unintended and unexpected event has occurred, and coverage exists.” Id. at 535. Here the court is focusing entirely on the consequences of an injury or loss; i.e., the damages it causes, instead of the nature and cause of the loss. So according to the Nebraska Supreme Court, negligent construction is an accidental occurrence only when it damages other property or work of third parties.

Four other state Supreme Courts have followed the Nebraska Supreme Court’s rationale: ACUITY v. Burd & Smith Construction (North Dakota 2006) 721 N.W.2d 33; Kvaerner Metals Division v. Commercial Union Insurance Company (2006) 598 Pa. 317; Essex Insurance Company v. Holder (2008) 372 Ark. 535; and Cincinnati Insurance Company v. Motorists Mutual Insurance Company (Kentucky 2010) 306 S.W.3d 69. The Nebraska Supreme Court did not rely on any of the four typical insurer arguments referenced above and in fact found coverage for the contractor finding that its faulty workmanship caused damage to other property.

The North Dakota Supreme Court recognized that a CGL policy may provide coverage for claims arising out of tort, breaches of contract, and statutory liabilities as long as the requisite accidental occurrence and property damage are present but at the same time “reiterated” that a CGL policy is not a performance bond and is not intended to protect a contractor’s business risk to replace or repair defective work that does not conform to the agreed contractual requirements. ACUITY v. Burd & Smith Construction, supra, 721 N.W.2d at 38 and 40.

The Pennsylvania, Arkansas and Kentucky Supreme Courts have been more extreme in their holdings. Pennsylvania held that the definition of “accident” required to establish an “occurrence” under a CGL policy cannot be satisfied by claims of faulty workmanship because such claims do not present the degree of “fortuity” contemplated by the ordinary definition of “accident”. Kvaerner Metals Division v. Commercial Union Insurance Company, supra, 598 Pa.
at 335-336. Arkansas held that faulty workmanship is not an accident but instead a foreseeable occurrence that performance bonds insure against. *Essex Insurance Company v. Holder*, *supra*, 372 Ark. 535, 540. Kentucky took the “fortuity” argument in *Kvaerner* even further and urged courts to keep in mind that a fortuitous event is one that is “beyond the power of any human being to bring … to pass, [or is] … within the control of third persons …” and that it was therefore “abundantly clear” that the issue of control is encompassed in the fortuity doctrine. *Cincinnati Insurance Company v. Motorists Mutual Insurance Company*, *supra*, 306 S.W.3d at 76. Kentucky seems to believe that refusing to find that “faulty workmanship” can be an “occurrence” will encourage general contractors to choose their subcontractors more carefully. *Id.* at 75.4

**“PROPERTY DAMAGE”**

Even if a court should find an “occurrence,” coverage under a CGL policy is not triggered unless there is actual property damage within the scope of the insuring agreement. There are two definitions of property damage in a post-1986 CGL policy:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

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4 For a good rebuttal to this argument, see *Great American Insurance Co. v. Woodside Homes Corp.* (2006) 448 F.Supp. 1275, 1281, which points out that a general contractor has minimal control over the work of its subcontractors by definition and the fact that the general contractor receives coverage will not relieve the subcontractor of ultimate liability for unworkmanlike or defective work because an insurer will have subrogation rights against the subcontractor who performed the defective work. “Further, while disallowing coverage for faulty subcontractor work would arguably increase the level of care general contractors take when selecting subcontractors, there are several other practical factors that already serve this function. A general contractor's concern about business reputation and the understandable desire to avoid time consuming repair work--regardless of whether the general contractor must foot the bill for such work--are two such factors that are readily apparent.”
All of the eight Supreme Court cases listed in the Overview of this brief easily found property damage based on the first definition. Here are examples of the property damage alleged in those cases:

1. Negligent soils engineering advice that resulted in excessive settlement of the soil after a warehouse was completed, which caused the building foundation to sink, which caused the rest of the structure to buckle and crack. *American Girl*—Wisconsin Supreme Court.

2. Leaking windows leading to cracking and leaking of the exterior stucco of a home. *Lee Builders*—Kansas Supreme Court.

3. Water and moisture penetration into a hotel causing premature deterioration of and damage to other components of the interior and exterior wall structure; mold. *Moore & Associates*—Tennessee Supreme Court.

4. Cracking sheetrock and stone veneer in a home attributed to defects in the foundation; the completed home is considered “tangible property”. *Lamar Homes*—Texas Supreme Court.

5. Soil settlement due to a subcontractor’s use of poor soil and improper soil compaction and testing which caused structural damage to homes in a subdivision. *J.S.U.B.*—Florida Supreme Court.

6. Negligent application of stucco that resulted in water intrusion. *Newman*—South Carolina Supreme Court.

7. Allegations of no rebar placement in the foundation of a home resulting in total loss of building. *Architex*—Mississippi Supreme Court.

8. Water leaks and fungus growth in homes in a subdivision caused by faulty work of subcontractors, including lack of adequate flashing and caulking around windows, lack of weather resistant barrier behind brick veneer, improperly flashed or sealed opening for chimneys and vents and inadequate ventilation in crawl space. *Sheehan*—Indiana Supreme Court.

Few courts have found it necessary to address the second definition of “property damage;” however, one California case arising not out of a construction defect case but out of an encroaching structure case did recognize the distinction. See *Borg v. Transamerica Insurance Company* (1996) 47 Cal.App.4th 448.
HOW TO ANALYZE THE SCOPE OF CGL COVERAGE FOR
CONSTRUCTION-RELATED CLAIMS

If you are in a jurisdiction that does not cut off coverage with a determination that faulty
workmanship cannot be an “occurrence” and therefore not within the insuring agreement, here
are three questions to ask to determine whether there is coverage under the standard-form 1986
policy:

1. Did the damage occur during the course of construction?

2. If the damage occurred after completion, was it caused by an unexpected or
unintended act of a subcontractor?

3. Did the faulty workmanship of the subcontractor cause post-completion
“physical damage” to insured property or “loss of use” of the property within
the definition of “property damage” in the CGL policy?

If the answer to No. 1 is yes, the PCOH coverage will not apply and there will be no
coverage or limited coverage. If the answer to No. 2 is yes, the “your work” exclusion will not
apply. If the answer to No. 3 is yes, coverage should be available.

According to a treatise published by the International Risk Management Institute, Inc.
(“IRMI”) called “Commercial Liability Insurance,” the PCOH coverage insures against all the
following construction-related risks when PCOH coverage is triggered:

- Property damage to work performed by the insured when the damage
  results from the work of the insured’s subcontractor.

- Property damage to work performed by the insured’s subcontractor when
  the damage results from that subcontractor’s work.

- Property damage to work performed by the insured’s subcontractor when
  the damage results from work performed by the insured.

- Property damage to work performed by the insured’s subcontractor when
  the damage results from the work of another contractor or subcontractor.  

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5 Commercial Liability Insurance at V.D. 204-205 (IRMI 2006)

CONSTRUCTION DEFECT COVERAGE AND CGL POLICY
OTHER EXCLUSIONS

The emphasis of this article has been on the “your work” exclusion (exclusion l) of the CGL policy; however, some courts will discuss the application of the “contractual liability” exclusion (exclusion b), the “your property” exclusion (exclusion (j)(6)), and the “your product” exclusion (exclusion k). See the American Girl case, which discussed exclusions b and j(6). That case points out that “property damage” included in PCOH coverage is an exception to the (j)(6) exclusion for property damage. American Girl, supra, 268 Wis.2d at p. 50.

As to exclusion (k), the plain wording of the exclusion shows that the “work product” exclusion does not apply to real property. See also Wanzek Construction v Employers Ins. of Wausau., supra, 679 N.W.2d 322, 327. The exclusion appears to apply to a materialman or supplier of a materialman but not to a contractor who merely installs a product as part of his work. See Underwriters at Interest v. SCI Steel Con (W.D.Mich.1995) 905 F. Supp. 441.

American Girl also concluded that the contractual liability exclusion does not apply to allegations that the insured breached the contract but only claims made against the insured for pursuant to third-party indemnification or hold harmless agreements. American Girl, supra, 268 Wis.2d at pp. 47-49. However, see the recent decision from the Texas Supreme Court, Gilbert Texas Construction v. Underwriters at Lloyd’s London (2010) Tex. Sup. J. 780, which disagrees with American Girl and other state Supreme Court cases. The Gilbert case has a good discussion of exclusion (b) and the split of authority in courts across the county. Publication status of the Gilbert case is still pending and may have no precedential value.

Gilbert is relevant for other reasons: In that case, the insured argued that adopting the Supreme Court's eventual ruling would operate to "eviscerate" the court's prior ruling in Lamar Homes. The court disagreed, stating that its prior ruling related to what triggered the duty to
defend and did not involve exclusion (b). In addressing the duty to indemnify and whether the exclusion applied, the Texas Supreme Court explained:

In *Lamar Homes*, we did not address the duty to indemnify, but rather the separate duty to defend. An insurer’s duty to defend is determined under the eight-corners doctrine, while the duty to indemnify is determined by the facts as they are established in the underlying suit. *Id.* at 744 (quoting *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009)).

It is significant to any analysis of the *Gilbert* opinion to keep in mind that Gilbert benefited from the cloak of sovereign immunity provided by the Dallas Area Rapid Transit ("DART"). The trial court granted summary judgment in Gilbert's favor on all causes of action (including negligence), with the sole exception of leaving the breach of contract claim against Gilbert for violating its agreement with DART. During oral arguments, both sides acknowledged that they had been unable to locate a similar fact pattern case in any other jurisdiction. The court then reasoned:

Here, the facts demonstrate that Gilbert settled RTR’s breach of contract claim after the trial court granted judgment in Gilbert’s favor on all theories of liability besides the contractual one, and Gilbert does not contend the trial court erred in granting summary judgment on these other theories. Thus, Gilbert’s liability to RTR falls within the policy’s contractual exclusion for purposes of determining Underwriters’ duty to indemnify.

One Practice Note for insurance counsel. The insured in *Gilbert* argued that the excess insurer should be estopped from asserting exclusion (b) (the primary insurer paid policy limits). The insured claimed the excess insurer mandated that the sovereign immunity issue be determined by summary judgment in the underlying case before the parties there went to mediation. The excess insurer threatened to deny coverage based on the insured’s failure to cooperate if the insured refused to file that summary judgment motion. Essentially, the insured was left with a Hobson’s choice: heads the excess insurer wins, tails the insured loses. The insured argued that documents produced in the coverage case showed that the excess insurer
always intended to deny coverage based on exclusion (b) and its tactics were contrary to the insured’s best interests. The Texas Supreme Court was not sympathetic, finding:

…these facts do not show that Underwriters improperly coerced Gilbert into pursuing summary judgment on governmental immunity grounds. Underwriters acted within its contractual rights by associating in Gilbert’s defense and alerting Gilbert to the issue Underwriters believed would be presented under the policy’s cooperation clause if a legally valid defense existed but was not urged by Gilbert.

Thus, the Supreme Court found no estoppel. As such, counsel must be remain vigilant of any potential conflict of interest that exists early on between an insurer and insured regarding trial strategy. This statement is by no means a criticism of counsel in Gilbert, as there may have been nothing that could have done to change this outcome. Gilbert serves as another warning regarding the perils of dealing with an excess insurer during the defense of a claim.

POSSIBLE PITFALLS

The Insurance Services Office which promulgates forms such as the CGL Policy also has forms that remove this coverage from CGL Policies:

1. **CG 22 94**

   ISO Endorsement CG 22 94
   EXCLUSION—DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF

Exclusion 1 of Section 1—Coverage A—Bodily Injury and Property Damage Liability is replaced by the following.

2. Exclusions. This insurance does not apply to:

   1. Damage To Your Work. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
   Source: ISO Properties, Inc., Copyright 2000

   To provide project-by-project coverage, ISO issued Endorsement CG 22 95 Exclusion—Damage to Work Performed by Subcontractors on Your Behalf—Designated Sites or

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Operations," which is identical to CG 22 94, except it states that it applies only to those sites or operations designated in the schedule of the endorsement.

2. CR 0204 08 04

One final note.  If you are ever involved in an OCIP (Owner Controlled Insurance Program) and review the CGL Policy to see whether there is coverage for defective work, be careful that Endorsement CR 0204 08 04 entitled “CROSS LAWSUITS AND CLAIMS EXCLUSION” isn’t inserted into the policy. Because by its own terms, an OCIP covers all parties to the project, coverage for defective work by another subcontractor may be lost as it would be a claim asserted by “any insured.”

CONCLUSION

There are many pitfalls associated with purchasing insurance coverage that may be worth millions of dollars to you should defective work occur on one of your projects. The trend today across the country seems to be more towards coverage, but as noted in this paper, there are a number of products sold by the insurance industry that may take such coverage away. A competent insurance coverage attorney is a necessity in determining whether or not coverage for defective work exists.
Survey of States That Have Addressed
CGL Coverage for Faulty Workmanship

States Finding Coverage


States Finding No Coverage


Cases Finding of Suggesting Coverage in Lower State Court and Federal Court Decisions

4. Maryland: *French v. Assurance Co. of Am.* (4th Cir. 2006) 448 F.3d 693

EXHIBIT A

**Cases Finding No Coverage in Lower Appellate Court and Federal Court Decisions:**


**States Where Law is Unclear**


**States That Have Not Addressed the Issue**

1. Connecticut
2. Idaho
3. New Mexico
4. Rhode Island
5. Vermont

*EXHIBIT A*